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No. 93-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, Inc., a nonprofit membership organization of approximately 125,000 members. Although a number of its members are career federal civil servants, this brief is submitted by Public Citizen not on behalf of the interests of those members, but on behalf of Public Citizen's members generally who have an overriding interest in a strong and effective federal civil service. Public Citizen firmly believes that the government

is generally a positive force for good in our society, but that, in order for government to be effective, there must be not only strong and imaginative leaders, but dedicated, hard-working, able civil servants to carry out the policies set by those in charge. This in turn requires a workforce that has high morale and a dedication to the job. Those traits can be maintained only if federal employees believe that they are being treated fairly and play important roles in their organization.

The briefs of petitioners and its *amicus* Common Cause place considerable emphasis on the importance of the public perception that there is an honest federal civil service. We agree. But we also recognize that excessive attention to perceptions sometimes produces overly stringent rules, and that those rules, as applied to career civil servants, as well as political appointees, are not without cost. In some instances, they may be bad for morale, and, especially in combination with other and similar restrictions, they may ultimately destroy the quality of the federal work force by causing able people to leave and discouraging the next generation of would-be civil servants from applying for those jobs. Furthermore, if government employees are treated as though they cannot be trusted, that treatment may be translated into conduct since people often conform their behavior to the expectations set for them. Moreover, those who are subjected to stringent rules should be able to understand the rationales for them. It is difficult enough to secure compliance with restrictive but sensible rules; but when those rules don't make sense, compliance will be less likely, given grudgingly, and at a cost of undermining morale. This brief is being filed to demonstrate how senseless the rules at issue in this case are and to emphasize the costs that such rules impose on the workings of our government.

SUMMARY OF ARGUMENT

At issue in this case is a rule that prohibits career federal civil servants from receiving any compensation whatsoever for making certain categories of oral public statements and certain categories of writings. Although not a content-based restriction in the sense that the ban is directed at the subject matter of the speech or the viewpoints expressed, the effect of this "honorarium ban" is to reduce the amount of speech in our society, which makes it subject to scrutiny under the First Amendment.

In Point I of this brief, we demonstrate that the ban simply does not make sense. None of the traditional justifications offered for these kinds of restrictions on speech have anything to do with the ban at issue here. Moreover, two major exceptions -- one allowing officials to accept free travel, meals and lodging for "one relative" and the other allowing the official to direct that the sponsor make a charitable contribution of up to $2000 in recognition of the official -- undermine even the supposed bases for this ban. For these reasons, this ban cannot be sustained on any basis, let alone under the high level scrutiny to which it is subjected under the First Amendment.

In Point II, we review the literature and current thinking on the effect of excessive rules on federal employees. As this review makes clear, stamping out all perceptions of possible improprieties may be a good idea in the abstract, and it may be the right decision in some cases, but it is never without cost. Employee morale may suffer, valuable civil servants may leave the government, and others who are considering joining the federal civil service may never apply or decline appointments if offered. While perhaps not as well-recognized as the problem created when potential appointees for high-level executive appointments turn them down because of concerns about rules regarding financial disclosures, conflicts of interests, and post-employment restrictions, the burdens of the honorarium ban

on career employees, and hence on the overall effectiveness of our government, cannot be gainsaid. Accordingly, when weighing the governmental interest in the honorarium ban, that interest must be reduced by the burden that the regulation imposes on federal civil servants and ultimately the government programs and people whom they are employed to serve.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

The honorarium ban at issue here is challenged only as it applies to career federal civil servants. The ban applies to both certain types of oral statements and certain writings. In neither case is it a ban on the activity, but solely on the receipt of money for it. The government argues that this limited ban imposes only a minimal restriction since it does not directly forbid speech. Even if it were impossible to pinpoint particular individuals who have refrained from speaking or writing because of the honorarium ban -- and the record cited by respondents makes clear that there are specific individuals who have stopped writing because they can no longer be paid -- there can be no doubt that the effect of the ban is to reduce the overall quantity of speech from federal employees, a result that petitioners admit requires the rule to be judged under one of the standards applicable to the First Amendment, and not simply as a question of social or economic policy for which a rational basis would suffice. In our view, the Court should apply the level of scrutiny used in *Turner Broadcasting System, Inc. v. Federal Comm. Comm'n*, ___U.S.____, 62. U.S.L.W. 4647, 4658 (1994), which is that set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under it, a regulation can be sustained only if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Under this or any other standard applied in First Amendment cases, the challenged ban cannot be sustained.

I. THERE IS NO JUSTIFICATION FOR THIS HONORARIUM BAN.

A. *The Operation of the Ban.*

Although the ban applies to both speeches and writings, most of the discussion in the briefs of petitioners and their *amicus* focus on oral presentations, in large part because most of the record before Congress related to speeches, principally by Members of Congress or senior staff members, and not writings for general publications by anyone, let alone career federal civil servants. The obvious concern of Congress and the public regarding senior legislative branch personnel was that they would simply show up, stand up, make a brief statement, and get paid. Moreover, in most cases the audiences had direct interests in the subject of the speech, which was often a matter then pending before a committee of Congress to which the Member belonged or on which the staffer had a senior position.

Nonetheless, despite the quite limited nature of the record on which the ban was based, as explained more fully in the brief of respondents, the honorarium ban applies to all career civil servants, no matter on what topic they speak or write, how little or how much money they are paid, or who is making the payment. Furthermore, while single lectures are forbidden, a series of lectures is permitted, whether as part of a formal education course at an accredited university or not. And while no subject is off limits, the ban forbids the receipt of even a dollar by all federal officials, from

Members of Congress to GS-1 clerks and maintenance personnel.[1]

Although most of the legislative debate focussed on honoraria for a public appearance, the prohibition on payment for writings is the principal concern of many of the plaintiffs here. Because the ban is so broad, it applies to writing an op-ed piece in the *Washington Post*, a book review in the *New York Times*, or an essay in a specialty magazine on birds, South American Indians, or the history of the French resistance in World War II. Again, as with speeches, anyone can write, but they cannot be paid. Again, the ban applies without the necessity of any connection between the subject matter of the written work and the employment activity of the career civil servant. And, while federal civil servants cannot be paid for articles, they can be paid for writing books, or even chapters of books, even if those chapters had their origins in an article, or later became an article.

Moreover, "works of fiction, poetry, lyrics, or script" are all exempt from the prohibitions on compensation for writings, 5 C.F.R. § 2636.203(d) (Pet. App. 125a), and it appears that the exemption extends to oral presentations of such materials as well, since there is an exception in the definition of speech in 5 C.F.R. § 2636.203(c) for "recitation of scripted materials" (Pet. App. 124a). It thus appears that a Member of Congress could recite one of his poems at a meeting of a trade association that has business directly pending before the Member's committee and receive a fee of $1000, yet a career civil servant could not accept

[1]Although petitioners make much of the need to have the same ban apply to all covered personnel, we note that distinctions based on career vs. non-career personnel, on pay grades, and on branch of government are made in the related restrictions in the same act, 5 U.S.C. App. 7 § 502, which impose limits on other outside employment.

$100 for a technical lecture involving a subject having nothing to do with that individual's full-time job. That same regulation also excludes the "conduct of worship services or religious ceremonies," without regard to whether the person performing them is a licensed member of the clergy, and the definition of "appearance" in subsection (b) also excludes "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 5 C.F.R. § 2636.203 (b). Whatever the merits of such exemptions in the abstract, or whether the religious exception raises Establishment Clause issues, it is not difficult to see how they could be used as escape-hatches, especially by those whose presence, not their message, is the reason the sponsor decided to pay them.

B. *Possible Justifications for the Ban.*

In considering the constitutionality of the honorarium ban for career civil servants, even petitioners recognize that the First Amendment requires *some* public purpose for imposing it. Respondents' brief will focus on the appropriate test to be applied under the First Amendment. But in our view, any test, other than the highly deferential rational basis test applicable to economic regulations, which even petitioners do not seek, cannot sustain the honorarium ban at issue here.

Petitioners and their *amicus* attempt to cover up the weakness of the justifications for this ban by invoking broad generalizations, such as avoiding the appearance of impropriety and assuring the integrity of the federal workforce.[2] But, as was made clear in a recent report of a

[2] Petitioners describe the interest to be protected by the ban on honoraria in phrases such as payments that "can involve actual corruption; more importantly, [they] can readily convey an

(continued...)

special American Bar Association Committee on Government Standards (on which undersigned counsel served), those phrases are simply not helpful ways to analyze the issues raised by a wide variety of ethical questions. *See Keeping Faith: Government Ethics and Government Ethics Regulation*, 45 Admin. L. Rev. 287, 294-296 (1993)("*Keeping Faith*"). Rather, the proper way to consider the restriction is to focus on the specific rationales offered to justify it and then determine whether the restriction holds up under them. Accordingly, we now examine the possible justifications for

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[2](...continued)
appearance to the public that influential access to government officials can be purchased by outside interest groups" (Pet. Br. 19); they involve the "'potential for impropriety'" (20) or the "very appearances of impropriety that Section 501(b) sought to overcome" (23); the "interest in strengthening citizen confidence in the integrity of the federal workforce" (24 n. 21); payments "pose a threat to the public's perception of the integrity of the federal workforce," and the government has an "interest in reducing suspicion about the cause or effect of a particular honorarium," and the "possibility of impropriety" (25); "public confidence in government may be eroded because of actual or perceived impropriety in the receipt of honoraria" (28); and the ban "protect[s] the appearance of integrity of the federal workforce" (35).

Common Cause's brief contains similar expressions of the rationale for the rule: to "prevent real and apparent abuses of government office" and "[p]ublic distrust of government" (Am. Br. 3); to "ensure the appearance as well as the reality of impartiality in the federal government" (5); "polls and public surveys showed rising public cynicism over the practice of honoraria, and . . . the inherent potential for conflicts of interest" (7); ban will "promote public confidence in the integrity of government" and avoid "appearance of impropriety" (8); honoraria "undermined public confidence in fair government and created an appearance of impropriety, if not actual impropriety itself" (10).

the ban on the payment of money for speeches and articles and show that the ban cannot stand up under any level of scrutiny.

1. *The Content of the Speech*. We begin by restating what petitioners proclaim is not at issue here: the ban is not content based since it does not seek to suppress speech on particular subjects, and the government is not attempting to prevent any employee from speaking out on any issue, even if it might have some connection to an interest of the federal government. What petitioners fail to recognize, however, is that by eschewing reliance on the interest in suppressing speech because of its content, they jettison the principal cases that have upheld the suppression of speech by government employees: *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Waters v. Churchill*, 114 S.Ct. 1878 (1994). In each of those cases, the only basis for sustaining the government's position was that it had a legitimate interest in preventing the governmental employee from making certain statements, whether for pay or not. In each of those cases, the issue of pay was irrelevant, yet payment is what makes otherwise acceptable speech impermissible here. Stated another way, none of the employees in those cases would have been better (or worse) off if they had been paid for their speech. Accordingly, none of those authorities, nor for that matter the authorities involving the Hatch Act, such as *Broadrick v. Oklahoma*, 431 U.S. 601 (1973), or *CSC v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), assist petitioners because the rationale for each was that the government had the right to prevent speech because of its content, the very rationale which the government insists does not apply here.

2. *Misuse of Official Information*. A second rationale sometimes offered, often in conjunction with the first, is that it is not the message or the ideas contained in the speech that must be suppressed, but the misuse of government information, generally, but not always, for profit. The unauthorized use by Frank Snepp of CIA documents to write

and sell his book is the most well-known example in this Court of the ability of the government to suppress that kind of activity, *Snepp v. United States*, 444 U.S. 507 (1980), but similar although less direct uses of inside information to write an article, represent a client, or speak to a trade association on a topic of current interest within the employee's purview are within this rationale. *See* 18 U.S.C. § 1905 (forbidding dissemination of trade secrets and other confidential business information). The principle there is that the employee is improperly trading, for personal profit, on information gained by the employee on her job and that if she is discussing the issue at all, it ought to be only as part of the agency's information dissemination or outreach program and the speech subject to the agency's normal clearance processes. That rationale is also irrelevant to this honorarium ban because it is undisputed that none of these plaintiffs sought to write or speak on any topic remotely related to their federal employment.

3. *Profiting Based on One's Official Position*. A third justification involves situations in which the federal employee is paid for whom she is, not for what she has to say, and therefore she is profiting based on her position or title, which is similar to, although different from, the second category where the content of what is said is important. Of course, the two categories can, and often do converge, but that is not inevitable, since some audiences will pay to hear an important person, regardless of what she has to say. Since all of these plaintiffs are career civil servants, no one seriously contends that any payments made to them for speeches they give or articles they write is based on their titles or importance in the government hierarchy, rather than

the substance of what they have to say.[3] Accordingly, this rationale, too, falls by the wayside.[4]

4. *Prohibited Source of Payment*. Fourth, and this often overlaps with the third and to a lesser degree the second rationale, the source of the payment is suspicious because that person has an interest in a matter over which the recipient of the honorarium has influence in his or her official capacity. The fear, often justified, is that the prohibited source will use the honorarium to affect a government decision, much like a bribe, although more subtle since there is no explicit *quid pro quo*. Because there is no indication that anyone who is making the payment for any of the speeches or articles written by these federal career

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[3] *See Modifying the Honoraria Prohibition for Federal Employees: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 69 (1991)("*Honoraria Hearings*") (testimony of Stephen D. Potts, Director, Office of Government Ethics)("...there is not a lot to worry about on appearances of conflicts of interest if you are talking about lifting the honoraria ban for mid- and lower-level employees . . . [W]here the problem really crops up is with the higher ranking officials in the Government").

[4] Because the ban applies regardless of the amount to be paid, the Court is not faced with a statute which allows payments, but limits the amount that can be received, either on a per article/per speech basis, or on a cumulative basis from one source or from all sources. Those types of restrictions were in effect prior to enactment of the honorarium ban (Pet. Br. 2-3) and would be far easier to defend than the current statute, assuming that the permitted levels of payment were in the ranges allowed in those statutes.

civil servants has any business before those individuals, this rationale cannot apply.[5]

5. *Time away from Work*. Finally, it has been argued that the prohibition on accepting honoraria will help assure that federal employees do not become so involved in the pursuit of money that they neglect their federal jobs. We doubt that such a rationale could be sustained for most federal employees because of the range of far less restrictive alternatives available to ensure that the government receives a full day's work for a full day's pay. That kind of rationale might be available for the President and other very high ranking officials who are on call 24 hours a day; for them, it might be argued, being paid for an article or speech, as opposed to doing it for nothing, might be a sufficient inducement to cause them to take time away from official duties that might require their attention.

But the Court need not decide whether that rationale could defend a narrower ban for a limited group of government officials because here the very rule challenged contains exceptions that do more than call into question this

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[5] There can be no real problem in crafting a ban that is appropriately tailored to the evils sought to be eliminated. Thus, in the exception to the ban for a series of speeches or articles, Congress excluded instances where "the subject matter [of the writing or speech] is directly related to the individual's official duties or the payment is made because of the individual's status with the Government . . .." 5 U.S.C. App 7 § 505(3). Similarly, the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 542, 106 Stat. 2413-14, carves out an exception to the ban in section 501(b), but carefully tailors it to assure that the exception does not apply where there are valid reasons to impose the ban. To be sure, there are different ways to draft a ban on "related" speech or "prohibited" sources, and it is necessary to decide who should be subject to such rules, but no one suggests that the problem is in describing the lines to be drawn, rather than picking the appropriate dividers.

rationale as applied to this ban. Indeed, applying the "time away from the job" rationale would result in a ban for currently permitted activities and a permit for currently banned ones. Thus, if time and attention to duty were the issues, it would be wholly irrational to allow an employee to write a full-length book for pay, but to forbid her from writing a much shorter essay for pay, yet that is precisely the effect of the current honorarium ban. Similarly, if over-commitment of time was the legitimate issue, no one would forbid a single lecture for pay, but allow a series or even a full semester's course with appropriate compensation. Yet, once again, that is precisely what the current rule provides.[6]

C. *Major Exceptions Undermine Any Possible Basis for the Ban.*

The honorarium ban is difficult enough to justify on its own terms, but there are two express exceptions in the law that make it impossible to defend under the First Amendment. As this Court recently observed, "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination; they may diminish the credibility of the government's rationale for restricting speech in the first place." *City of LaDue v. Gilleo*, 114 S.Ct. 2038, 2044 (1994).

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[6] In addition, the honoraria ban does not specifically address the ability of federal employees to earn outside income from other activities, *i.e.* "moonlighting" in second jobs that do not conflict with their official duties and responsibilities. "[A] federal employee still can work as a horticulturist and be paid for growing roses in his or her spare time [but] cannot receive a fee for giving a talk to a garden club on growing roses." S. Rep. No. 29, 102d Cong., 1st Sess. 5 (1991). Surely, if the "time away from the job" rationale was a justification for the ban, these potentially more time-consuming activities also would have been prohibited.

The first of these suspect provisions, which is an express exception to the definition of honorarium in 5 U.S.C. App. 7, § 505(3), calls into question the legitimacy of the claim that the ban operates equally for all federal officials in practice as well as on the face of the statute. Thus, the prohibition on accepting honoraria in section 501(b) is absolute, but when Congress defined honoraria, it excluded travel reimbursements, which includes lodging and meals (section 505(3)), so long as the government official does not receive pay for the speech for which the travel is undertaken. Although potentially subject to abuse when the trip is to a particularly appealing location, we do not contend that an exception allowing reimbursement for reasonable travel expenses itself destroys the constitutionality of the honorarium ban.

The problem is created because section 505(3) expands that exception to permit the traveler to bring along "one relative" whose transportation, meals, and lodging can be paid entirely by the host. This provision, which was undoubtedly intended to allow the sponsor of an event to pay for the speaker's spouse, but also would include a parent, uncle, or minor child, raises two major difficulties. Although the exception is theoretically available to any activity subject to the ban, it has no relevance to what respondents are principally seeking to do: write articles for compensation. On the other hand, it has great significance for those who wish to give speeches in far away and exotic locations, and to take along their spouse. But for the vast majority of career civil servants, no one ever invites them to such places, let alone offers to pay for the travel, meals, and lodging of "one relative." The exception thus calls to mind the famous saying of Anatole France in *Crainquebille*: "The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread--the rich as well as the poor," *cited in* Evans, *Dictionary of Quotations* 363 (1993). Just as "the mere assertion of a content-neutral purpose [will not] be enough to save a law which on its face

discriminates based on content," *Turner Broadcasting*, *supra*, 62 U.S.L.W. at 4652, so the assertion that the honorarium ban applies equally to all federal officers and employees is not enough to save it when it operates very differently among those who are supposed to be affected equally.

Perhaps even more significant is the fact that the exception creates precisely the kinds of appearances of impropriety that the ban is supposed to eliminate. It is bad enough that a member of Congress or a senior congressional staffer is invited to a posh resort to give a speech (without pay), where the hospitality is likely to be more memorable than the talk that is delivered. But allowing the invitee to bring along a spouse at no cost is nothing less than a gaping loophole in the entire rationale for creating the ban in the first place. Since the "relative" performs no services in exchange for the travel, the generosity of the sponsor can only be the result of a desire to curry favor with the invitee because of his or her position. Indeed, unless otherwise prohibited (which may be the case for executive, but not legislative branch personnel, *see* 5 C.F.R. § 2636.204(b), Pet. App. 128a), the sponsor of the travel can have important business before the invitee, and hence paying for the invitee's relative can have precisely the same effect as the not-so-subtle bribes that the honorarium ban is supposed to eliminate. And even if one were to accept the rather far-fetched rationale that the ban on being paid for speaking and writing is designed to discourage people from devoting too much time to outside activities, allowing a federal official to bring along a relative on a speaking junket is likely to increase the desire of the invitee to spend an extra day away from work and to do something other than get caught up on office reading in his spare time away from home.

Finally, although the amount of money received is not relevant under the ban, the record indicates that those civil servants who publish articles are compensated at levels in the several hundred dollar range, whereas airplane fares (even coach), meals, and lodging for several days are likely to be

many times that amount, thereby compounding the conflicts problems raised above. Thus, like the proverbial thirteenth stroke of the clock, the exception for travel by a relative calls into question all that comes before it.

There is a second exception contained in section 501(c) that makes it clear both that the rationales offered for the ban are not sufficient to sustain it, and that a far less onerous law can be written to get at any legitimate concerns that may exist. This provision excludes from the ban payments of up to $2000 to charitable organizations made in lieu of honoraria, so long as the neither the federal official nor certain close relatives derive any financial benefit from the payment. Although receiving $2000 in cash is better than having someone donate that amount to the charity of their choosing, the latter is still a significant favor that will be remembered by the federal official, the charity, and its supporters, particularly if the official is a Member of Congress who is running for reelection. Moreover, unlike certain of the other exceptions, this one is not lost when "the subject matter [of the speech] is directly related to the individual's official duties or the payment is made because of the individual's status with the Government," as applies for a series of speeches, articles, or appearances under section 505(3). Furthermore, setting a $2000 maximum is a much more carefully tailored response to situations in which the possible appearance of impropriety is the only justification than is the absolute ban in section 501(b). Although somewhat less egregious than the travel exception, the charity exception also undermines the purported evenhandedness and rationale for the broad ban on receipt of honoraria at issue here. As the ABA Committee on Government Standards noted, the "blunderbuss effect" of such restrictions "creates pressure to carve out exceptions, which in turn further compromise the ethical coherence of the regulation." *Keeping Faith* at 320.

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Those are the rationales offered by petitioners and their *amicus*, and each is woefully lacking in substance. Indeed, it is even doubtful that they would pass the rational basis test, let alone the far more stringent First Amendment standards that apply here. It is not simply that these rationales are unconvincing or fail to meet a heightened First Amendment level of scrutiny; rather they are, when carefully analyzed and applied to the specifics of what is prohibited and what is not (including the exceptions for paid travel for a relative and payments to charities), silly to the point of insulting to those who are forced to abide by them. As we now show, the harm done is not limited to the repression of speech, but also effects the quality of work done by the government.

II. THE HONORARIUM BAN IS COUNTER-PRODUCTIVE BECAUSE IT NEEDLESSLY HARMS THE MORALE AND EFFECTIVE-NESS OF CAREER FEDERAL EMPLOYEES.

The honorarium ban set forth in section 501(b) contravenes one of the most important and necessary objectives of ethics reform: "[W]e cannot afford to have unreasonably restrictive requirements that discourage able citizens from entering public service." *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* 2 (Mar. 1989). *See also* The White House, "Remarks by the President to the Ethics Commission During Signing of An Executive Order" (Jan. 25, 1989). "The goal of any legislation in this area is to achieve the appropriate balance between maintaining the public's trust in the ethical conduct of its Government and permitting federal employees the freedom and opportunity to pursue professional and personal growth." S. Rep. No. 29, 102d Cong., 1st Sess. 3 (1991).

The honorarium ban prevents federal employees from receiving compensation for activities which in no way relate to the nature of their employment or the character of the payor. In doing so, it damages the morale and productivity of those career civil service workers currently employed by the federal government and is likely to discourage able and dedicated people from entering public service. "An 'ethics' rule that treats a file clerk's income from writing an article on pet care like a Senator's income from speaking to an interest group affected by pending legislation cannot credibly claim to embody a value system worthy of employees' respect." *Keeping Faith* at 320.

Although it is difficult to ascertain the reasons why employees leave federal service, and almost impossible to assess why some choose not to enter at all,[7] experts on the career civil service have repeatedly emphasized that the ban will reduce the quality of the federal work force by creating yet another disincentive to join or remain in public service. "By constricting the sphere of 'private' life, these rules foster a perception of the government as a heavy-handed and meddlesome employer." *Id.* at 320. The ban effectively denies federal employees their outlets for stress, as well as their avenues for personal development, whether as a historian or a writer or a garden club lecturer. As a result, the government will become even more unattractive to employees already disenchanted with public service[8].

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[7] See *Effects of Federal Ethics Restrictions on Recruitment and Retention of Employees: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 101st Cong., 1st Sess. 61-63 (1989) (statement of Frank Q. Nebeker, Director, Office of Government Ethics) ("*Recruitment and Retention Hearings*").

[8] *See Honoraria Hearings* at 18 (testimony of Rep. Constance A. Morella) ("Essentially, we are sending a message to the public:
(continued...)

"[E]thics-in-government laws are part of a bargain; if they are unduly restrictive, no bargain will be struck, and the government will lose the services of persons it wants and needs." Arthur S. Neely, IV, *Ethics-in-Government Laws: Are They Too "Ethical"?* 55 (1984) ("*Too Ethical*").[9]

The honorarium ban harms the career civil service because it violates an essential principle of human nature: rules that appear fair and reasonable invite compliance, while rules that categorically forbid behavior invite disobedience and engender ill-will.[10] Among the justifications for the ban advanced by petitioners and their *amicus* is that broad prophylactic restrictions are necessary because narrower rules are easier to evade. In reality, overly stringent rules can have costs that were never intended or even considered by those seeking to address the problem: "The danger that must be recognized and avoided is the assumption that there can

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[8](...continued)
If you are creative on your own time, don't join the Federal Government. If you are creative and a Federal employee, leave").

[9] *See also Honoraria Hearings* at 141 (statement of Carol A. Bonosaro, President, Senior Executives Association)(quoting one SEA member who if forced to "abandon his hobbies, which provide outside income...will 'probably continue with the government, albeit with considerable pain and bitterness'").

[10] *Keeping Faith* at 295 ("no ethical system will be internalized by its members unless they are persuaded that it represents what is *right* as well as what is *the law*")(emphasis in original); *see also Recruitment and Retention Hearings* at 63 (testimony of Frank Q. Nebeker cautioning against restrictions which "are clearly drafted to cover conduct that is beyond [the] legitimate interests of the government," and favoring prohibitions only when "a governmental process would be harmed...or there would be a reasonable and clear loss of credibility on the part of the public in the governmental processes if [the employee] engaged in the conduct").

never be a harmful surplus of ethics in government." *Too Ethical* at 54. Despite petitioners' self-serving claim that the ban has a minimal impact on employees, its inevitable effect will be to drive capable employees from government service. "The bite of this kind of prior restraint is mild, of course, and in a sense optional; any man who objects may avoid it by not serving in government office. But that is not enough of an answer. We *want* men to serve the government." Bayless Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 Fed. Bar J. 239, 254 (1964) ("*Manning*"). As the ABA Committee on Government Standards concluded, a "genuine commitment to improving ethics in government...requires resisting the simple, and popular, assumption that more regulation is better regulation." *Keeping Faith* at 340.

Furthermore, by extending the honorarium ban to all private activities, the government sends a message of distrust to its employees. A rule which presupposes the existence of corruption when there is no reasonable likelihood that it actually exists not only demeans and demoralizes employees, but is counterproductive as well. First, it loses sight of the potential inherent in treating employees as persons of honor and integrity. Most federal employees, especially career civil servants, entered government because of their commitment to public service, despite the "many well-known and broadly accepted burdens" which it entails. *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* 1 (Dec. 1988). The honorarium ban ignores the psychological reality that servants of an effective government must feel invested with confidence in their integrity. "The best way to make a man trustworthy is to trust him. And the best way to attract men of dignity to public service is to treat them as men of dignity." *Manning* at 254.

In addition, such stringent regulation may in turn produce the kind of ethical abuses that the regulations hope to eradicate: "If we insist upon treating government

employees as if neither their motives nor their judgement can be trusted, those who do not leave in frustration and disgust will end up by being no better than they are posited to be." *Keeping Faith* at 294. Already demoralized by stagnant pay scales and increasing public animosity towards government service, many career civil servants will perceive the ban as another unfair burden they are expected to bear. And when treated with suspicion and forced to adhere to draconian rules, it is understandable that even the most dedicated public servant will be increasingly less willing to shoulder those burdens.

For all these reasons, there can be no doubt that the honorarium ban has had and will continue to have significant adverse impacts on federal employment that must be taken into account in an assessment of the validity of the ban. The problems created by being "too ethical" undermine the governmental interests that the ban purports to serve. Coupled with the absence of any legitimate justification for the ban, and the very significant exceptions that undercut the rationales that are claimed to support it, the court of appeals was plainly correct in holding that the ban violates the First Amendment.

CONCLUSION

The judgment of the court of appeals striking down the honorarium ban should be affirmed.

Respectfully submitted,

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